STATE OF MICHIGAN

COURT OF APPEALS

KENNETH BROOKS, SR., and DARLENE BROOKS, as Co-Personal Representatives of the Estates of BRENDA HERNADEZ,

Plaintiffs-Appellants/Cross-Appellees,

v

OFFICER ALAN KNAPP, OFFICER G. DRUMB, OFFICER VANDERBILT and WATERFORD TOWNSHIP,

Defendant-Appellees/Cross-Appellants.

UNPUBLISHED
May 10, 2007

No. 272707
Oakland Circuit Court
LC No. 05-063468-NZ

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this civil rights action. On cross-appeal, defendants challenge the trial court's earlier order denying their motion for summary disposition pursuant to MCR 2.116(C)(8). Because plaintiffs failed to present a genuine issue of fact with regard to whether defendants violated MCL 37.2302 by denying Brenda Hernandez full and equal enjoyment of a public service, summary disposition in defendants' favor is appropriate, and therefore, we affirm the order granting defendants' motion for summary disposition and decline to address defendants' cross-appeal because it is moot.

I. Substantive Facts

On February 11, 2001, Gilbert Hernandez shot and killed his wife, Brenda Hernandez, and then killed himself. Plaintiffs, Kenneth Brooks and Darlene Brooks (collectively "the Brooks" or "plaintiffs"), are Brenda's parents and co-personal representatives of her estate.

In August 2000, the Waterford Township Police Department ("WTPD") began receiving reports of domestic disturbances at the Hernandez residence at 3674 David K. Drive, Waterford, Michigan. On August 25, 2000, Brenda made an emergency 9-1-1 call to the WTPD from a

local 7-11 convenience store. She indicated that she had received a threatening phone call from Gilbert, that they were in the process of getting a divorce, and that she feared for her safety. WTPD officers arrived at the convenience store and accompanied Brenda to her residence. They advised her to stay at her parents' house that evening.

On October 2, 2000, Brenda secured a personal protection order ("PPO") against Gilbert. The PPO prevented Gilbert from, among other things, appearing at Brenda's work place or residence; assaulting, wounding or threatening to kill or injure Brenda; or purchasing or possessing a firearm. The PPO stated that it was effective immediately, would remain in effect until October 2, 2001, and that Gilbert could be arrested immediately for violating its conditions. Although the PPO expressly prohibited Gilbert from appearing at Brenda's residence, the PPO indicates that Gilbert and Brenda both resided at 3674 David K. Drive.

On October 20, 2000, Brenda filed for divorce in Oakland County. One week later, on October 27, 2000, Gilbert was served the PPO. The next day, Brenda requested police assistance at 3674 David K. Drive because Gilbert "was drunk and yelling at her in their home and threatening personal harm to her and her family members." She allegedly told the police about the PPO against Gilbert, that Gilbert was violating the PPO and that Gilbert possessed a firearm. By the time the police arrived at the house, Brenda had fled the home with their son, Cruz Hernandez, and Gilbert had followed in a separate car. The police searched the house and interviewed neighbors, but made no arrests.

On December 25, 2000, the Brooks were visiting Brenda at 3674 David K. Drive. Although Gilbert was not home at that time, he later arrived visibly intoxicated or "high." Plaintiffs claim he was verbally abusive. When Brenda attempted to leave the house, Gilbert began yelling at her. When the Brooks attempted to intervene, Gilbert pushed Darlene into a chair and pushed Kenneth outside the house. While outside, Gilbert punched and kicked Kenneth. The WTPD was called and advised about the outstanding PPO. Officers were dispatched to the house but Gilbert fled the premises by car before they arrived. Gilbert was later pulled over and arrested for assault and violation of the PPO.

On December 26, 2000, Gilbert moved out of the house he had shared with Brenda at 3674 David K. Drive. On December 28, 2000, the trial court modified the PPO. The modified PPO contained the same provisions as the original, except it allowed Gilbert to be present at Brenda's house for parenting time. The modified PPO was effective from December 28, 2000, through October 2, 2001.

On February 4, 2001, Brenda called WTPD and told them that Gilbert had threatened to kill her. Officer Gregory Drumb was dispatched to the residence. The dispatcher told him that Gilbert had called and threatened Brenda. Brenda also reported that a firearm was missing from the house. When Officer Drumb arrived, Gilbert was not at the home. Officer Drumb wrote in his report that his computer records indicated that the modified PPO had not yet been served on Gilbert. No arrest was made. Instead of subjecting Gilbert to arrest for his apparent February 4, 2001, violation of the PPO, Brenda and Gilbert's attorneys allegedly worked out an arrangement that required Gilbert to check himself into Harbour Oaks Hospital for substance abuse rehabilitation. On February 6, 2001, Gilbert voluntarily checked himself into the hospital. On February 10, 2001, Gilbert was discharged from the hospital. That same evening, at 10:05 p.m., WTPD received a hang-up phone call from Brenda's residence.

Defendants, Officers Drumb, Alan Knapp and Todd Vanderbilt of the WTPD responded to the call. When they arrived at the residence, Gilbert was present with his friend, Jaime Chenhalls. Gilbert claimed he wanted his paycheck that had been mailed to the house. Brenda did not have a copy of the modified PPO. She opined that it had probably not been served on Gilbert. The officers placed Gilbert in the back of the patrol car while Officer Drumb contacted the dispatcher to request information about the modified PPO. The officers learned that the PPO had not yet been served, but the conditions contained therein were the substantially the same as the original, except for the "parenting time" provision. The officers orally served Gilbert with the modified PPO and allowed Gilbert the opportunity to comply with the order. Gilbert agreed to do so and left without being arrested. The officers told Brenda that they would put an extra patrol on her residence in the event that Gilbert returned and attempted to enter her home.

The next morning, on February 11, 2001, Gilbert returned to Brenda's home and forcefully entered the house. Before Brenda could contact police, Gilbert shot her and then himself. After receiving phone calls from neighbors, the police arrived at Brenda's house at approximately 8:00 a.m. They found Gilbert dead in the back yard from a self-inflicted gunshot wound. Brenda was found alive, but died several hours later at the hospital.

II. Procedural History

On January 7, 2005, plaintiffs filed the instant action against Waterford Township and the individual officers for alleged violations of the Civil Rights Act, MCL 37.2101 *et seq.* On March 14, 2005, defendants filed their motion for summary disposition under MCR 2.116(C)(8). Defendants argued (1) that defendants cannot be held liable under the Civil Rights Act for exercising their discretion in responding to a complaint; (2) plaintiffs failed to state a claim under the Civil Rights Act because Brenda was not a member of a "protected class"; and (3) that with regard to plaintiffs' allegations that defendants failed to protect Brenda, defendants did not owe a duty to Brenda under the public duty doctrine. With regard to defendants' reliance on the public duty doctrine, defendants argued that " . . . the Act was not intended to apply to a situation where the police exercised their discretion in responding to a complaint from a resident." On April 11, 2005, plaintiffs filed their response, arguing (1) that the doctrine of collateral estoppel precluded defendants' motion, (2) plaintiffs properly pleaded the elements of their claim under the Civil Rights Act, and (3) the public duty doctrine does not apply to claims brought under the Civil Rights Act.

On June 8, 2005, the circuit court held a hearing regarding defendants' motion. The circuit court ultimately denied defendants' motion. The circuit court ruled that the public duty doctrine was inapplicable and that plaintiffs properly alleged a viable claim for gender or marital discrimination under the Civil Rights Act. On July 11, 2005, defendants filed an application for leave to appeal the circuit court's June 20, 2005, order denying their motion. On November 1, 2005, this Court denied defendants' application "for failure to persuade the Court of the need for immediate appellate review." *Brooks v Knapp*, unpublished order of the Michigan Court of Appeals, entered November 1, 2005.

On February 13, 2006, defendants filed a second motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants argued that (1) plaintiffs failed to establish that defendants denied Brenda a public service based upon her gender and marital status, and (2) defendants did not owe Brenda a duty to enforce the PPO or make an arrest. On March 6, 2006,

plaintiffs responded, arguing that the fact that the police could have arrested Gilbert but chose not to because of Gilbert's plea for leniency was circumstantial evidence that defendants violated the Civil Rights Act. On April 26, 2006, the circuit court held a hearing regarding defendants' motion where the parties essentially reiterated the arguments made in their respective briefs. On May 9, 2006, the circuit court entered an order granting defendants' motion based on the following:

> . . . [T]he Plaintiffs have presented evidence, by way of Mr. Chenhalls' testimony, that, on February 10, 2001, Mr. Hernandez asked the officers for leniency because he was going through a divorce and had just seen his wife with another man. Plaintiffs argue Mr. Hernandez's reference to gender and marital status coupled with the officers' failure to arrest him constitutes circumstantial evidence of gender and/or marital status discrimination. However, plaintiffs have no evidence that these statements had any bearing on the officers' decision not to arrest. Their claim that they failed to arrest Mr. Hernandez on February 10, 2001[,] based on gender or marital status is pure speculation. Further, Waterford Township Police Department had a policy that prohibited its officers from making decisions to arrest based on marital status or gender and plaintiffs have failed to raise a genuine issue of material fact to the contrary. As such, the plaintiffs have failed to present evidence that raises a genuine issue of material fact on their claim of a violation of the Elliot Larsen Civil Rights Act by any of the defendants.
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> The Court finds that the defendants have met their burden on this motion and have established that there is no genuine issue of material fact that defendants did not deny Brenda Hernandez the "full and equal enjoyment" of public service. MCL 37.2302. Defendants' motion is granted.

On August 10, 2006, the circuit court denied plaintiffs' motion for reconsideration. On August 25, 2006, plaintiffs filed their claim of appeal from the circuit court's May 9, 2006, order. On September 7, 2006, defendants filed their claim of cross-appeal apparently challenging the circuit court's June 20, 2005, order denying defendants' earlier motion for summary disposition.

III. Plaintiffs' Appeal

Plaintiffs argue that the circuit court erred by granting defendants' motion for summary disposition. The circuit court granted defendants' motion based on plaintiffs' failure to present a genuine issue of fact with regard to whether defendants violated MCL 37.2302 by denying Brenda full and equal enjoyment of a public service. This Court reviews the circuit court's determination on a summary disposition motion de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. Where there is no genuine issue of material fact the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). In reviewing a motion, we must consider "the pleadings, depositions, admissions, and documentary evidence" submitted by the parties in the light most favorable to the non-moving party. MCR 2.116(G)(5); *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005). This Court also reviews de novo questions of statutory interpretation. *Ayar v Foodland Distribs*, 472 Mich 713, 715-716; 698 NW2d 875 (2005).

Plaintiffs allege that defendants denied Brenda the full and equal enjoyment of police protection because of her gender or marital status in violation of the civil rights act, MCL 37.2302. MCL 37.2302 provides, in pertinent part:

> Except where permitted by law, a person shall not:
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> *Deny* an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . *because of* religion, race, color, national origin, age, sex, or marital status. [Emphasis added.]

Here, the statute by its terms requires plaintiffs to show (1) that Brenda was denied a public service, and (2) that the denial was based on her sex or marital status. Proof of discriminatory treatment in violation of the civil rights act may be established by direct evidence or by indirect or circumstantial evidence. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001); *Harrison v Olde Financial Corp*, 225 Mich App 601, 606-607; 572 NW2d 679 (1997). Plaintiffs allege that "[i]t is the custom, policy or practice of Waterford Township to provide less protection for victims of domestic violence than to other victims of violence and/or not make arrests for violations of PPOs."

Resolution of this issue turns in part on this Court's interpretation of MCL 37.2302. The rules of statutory interpretation require the courts to give effect to the Legislature's intent. *Universal Underwriters Ins Group v Auto Club Ins Assoc*, 256 Mich App 541, 544; 666 NW2d 294 (2003). The first criterion in determining the Legislature's intent is the specific language of the statute. *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004). The fair and natural import of the terms employed, in view of the subject matter of the law, governs. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Nastal*, *supra* at 720. Further, we cannot read into a statute terms or conditions not encompassed by its language. *Halloran*, *supra* at 577*; Omne Financial Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

"Deny" is not defined in the Act. The undefined words of a statute must be given their plain and ordinary meaning, which may be ascertained by looking at dictionary definitions. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Deny in this context means "to withhold the possession, use, or enjoyment of" or "to withhold something from, or refuse to grant a request of." Random House Webster's College Dictionary (1997). Here, it is beyond dispute that the WTPD went to Brenda's house on numerous occasions in response to telephone calls regarding Gilbert's threatening behavior.

On August 25, 2000, the police arrived at the convenience store so they could accompany Brenda to her house and then advised her to stay at her parents' house. On October 20, 2000, the police arrived at Brenda's house, but Brenda had already fled the home. On December 25, 2000, the police arrested Gilbert for violating the original PPO. On February 4, 2001, the police went to Brenda's home after she received threatening phone calls, but Gilbert was not at the house. On February 10, 2001, the police officers arrived at Brenda's house, informed Gilbert of the outstanding PPO that he had not yet been served with, and allowed him the opportunity to comply with the order, which he did. According to plaintiffs' complaint, Gilbert shot Brenda on

February 11, 2001, before she called the WTPD. Many of the allegations in plaintiffs' complaint are not regarding nonfeasance by the WTPD, but rather, misfeasance such as failure to properly investigate or question witnesses, failure to arrive at Brenda's house fast enough or failing to arrest Gilbert when the law allowed them to do so.

The foundation for plaintiffs' civil rights action is their allegation that it is the WTPD's policy, custom and practice "to provide *less protection* for victims of domestic violence than to other victims of violence and/or *not to make arrests* for violations of PPOs." It is uncontroverted, therefore, that this is not a case where defendants refused to respond to Brenda's complaints. This is a case where plaintiffs contend that defendants failed to properly respond to Brenda's complaints because they did not arrest Gilbert on each occasion. Plaintiffs' complaint demonstrates that there was not a *denial* of a public service, but rather, plaintiffs believe that defendants did not perform those services in a manner plaintiffs deem sufficient. Plaintiffs, therefore, were not denied a public service as is required by MCL 37.2302.

Also, plaintiffs fail to set forth any evidence that defendants' purported denial of police services was because of Brenda's sex or marital status. Plaintiffs allege that she was treated differently because she was a "victim of domestic violence." Such victims, however, are not a protected class under MCL 37.2302. Further, the record is devoid of any evidence that the fact that Brenda was a woman or had filed for divorce was a motivating factor for the WTPD to not provide Brenda the level of protection plaintiffs deem acceptable. Plaintiffs argue that the deposition testimony of Gilbert's friend, Crenhalls, demonstrates that the police discriminated against Brenda. Crenhalls testified that Gilbert pleaded with the officers for leniency because he was going through a divorce and was upset because he saw his wife with another man. Yet, plaintiffs fail to set forth any evidence that the officers considered Gilbert's plea in making their decision not to arrest him.

Plaintiffs also contend that indirect evidence of discrimination is the fact that defendants *could have* arrested Gilbert under on any number of occasions for his violations of the PPO or other apparently illegal behavior. However, the statutes cited by plaintiffs did not *require* WTPD to make an arrest and charge Gilbert with a crime. MCL 764.15a provides that a peace officer, in a domestic relations matter, *may* make a warrantless arrest in certain situations. MCL 600.2950(22) requires a peace officer to enforce a PPO where the PPO has been properly served on the person subject to the PPO. Here, as stated, the WTPD responded to Brenda's calls and either arrested Gilbert or made Gilbert leave the premises in accord with the terms of the original PPO. With respect to the modified PPO, defendants, in accord with MCL 600.2950(22), informed Gilbert of the modified PPO and allowed him the opportunity to immediately comply with it, which he did. Defendants were acting under the WTPD Domestic Violence Policy that prohibited police officers from determining whether probable cause exists to believe that a crime has been committed by using factors such as marital status or the sex of the parties involved.

Plaintiffs erroneously argue that Brenda had a right to have Gilbert arrested and that defendants' failure to do so requires the conclusion that the failure was because of Brenda's sex or marital status. Such is impermissible speculation and improper basis for the circuit court to deny defendants' motion. See *Hall v CONRAIL,* 462 Mich 179, 187; 612 NW2d 112 (2000). The circuit court correctly granted defendants' motion for summary disposition under MCR 2.116(C)(10).

IV. Defendants' Cross-Appeal

Defendants argue on cross-appeal that the circuit court erred by denying its earlier motion for summary disposition based on MCR 2.116(C)(8). Because our resolution of the foregoing renders the issue moot, we decline to address the merits of defendants' cross-appeal. *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 139; 393 NW2d 161 (1986).

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto